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RICK L. MARCEAU
Assistant President

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General Secretary and Treasurer

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LEGAL DEPARTMENT

CLINTON J. MILLER, III
General Counsel

• KEVIN C. BRODAR
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• ROBERT L. McCARTY
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• DANIEL R. ELLIOTT, III
Associate General Counsel

UPS NEXT DAY AIR

November 15, 2004

ENTERED
Office of Proceedings

NOV 16 2004

Part of
Public Record

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001
(202) 565-1674

212558

Re: STB Finance Docket No. 34540

Dear Mr. Williams:

Please find enclosed the original and 10 copies of the United Transportation Union's Motion to Compel in the above-captioned matter. In accordance with prior Board's requirements, we have also enclosed a disk in WordPerfect format.

Thank you for your cooperation.

Sincerely,

Daniel R. Elliott, III
Assistant General Counsel

Enclosure

cc: C. J. Miller, III, General Counsel



BEFORE THE
SURFACE TRANSPORTATION BOARD

212 558

FINANCE DOCKET NO. 34540

COLUMBUS & OHIO RIVER RAIL ROAD - ACQUISITION
AND OPERATION EXEMPTION - RAIL LINES OF CSX
TRANSPORTATION, INC. FROM COLUMBUS TO NEWARK,
OHIO AND FROM MT. VERNON TO CAMBRIDGE, OHIO

UNITED TRANSPORTATION UNION'S
MOTION TO COMPEL

ENTERED
Office of Proceedings

NOV 16 2004

Part of
Public Record

Daniel R. Elliott, III
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400



United Transportation Union ("UTU") respectfully moves the Board pursuant to 49 C.F.R. § 1114.31 to compel The Columbus & Ohio River Rail Road ("CUOH") to produce various materials requested by UTU on October 21, 2004. To this date, CUOH has failed to provide the documents requested.

On September 24, 2004, CUOH filed its Notice of Exemption under 49 C.F.R. § 1150.41. UTU filed a Petition to Revoke on October 22, 2004, along with a document request to CUOH pursuant to 49 C.F.R. §§ 1121 and 1114 (attached hereto). On October 19, 2004, CUOH responded to UTU's Petition, noting that "UTU does not specifically indicate that it intends to seek discovery from CUOH." It also claimed that "UTU failed to submit discovery requests in conjunction with its Petition."

On October 22, 2004, CUOH filed an Amended Petition for Exemption by adding to the scope of the transaction by including two new lines to be leased or bought. For some unknown reason, CUOH filed another Reply to UTU's Petition to Revoke on October 28, 2004, providing the same unfounded reasons for its failure to respond to UTU's discovery request.

On October 28, 2004, UTU sent a letter to CUOH's lawyer in this proceeding asking that the carrier comply with UTU's discovery request. UTU noted that it did include its discovery request in the Petition to Revoke in this proceeding and did indicate in the Petition to Revoke that a discovery request was being served in accordance with 49 C.F.R. § 1121 and § 1114 (Copy of letter attached hereto. See also UTU Petition to Revoke in Finance Docket No. 34540.)

On November 5, 2004, CUOH sent a letter in response to UTU's document request providing the same completely unfounded reasons for failing to comply with UTU's discovery. Apparently, CUOH is claiming that since UTU did not file a discovery request for Finance Docket No. 34540 in its filing in a totally separate proceeding, Finance Docket No. 34536, UTU somehow waived its right

to seek discovery in this proceeding. However, CUOH does not note that it had not even filed its Verified Notice of Exemption in this proceeding when UTU had filed its Petition to Revoke and Amended Petition to Revoke in Finance Docket No. 34536.¹ As a result, it is clear that CUOH's argument is completely unfounded since no Notice of Exemption had been filed for UTU to revoke or serve a discovery request regarding at the time of UTU's filing. Therefore, it is quite clear that CUOH's refusal is simply an effort to hide its documents or to be uncooperative.

Moreover, this result regarding the waiver of discovery suggested by CUOH in its Reply would clearly be contrary to the Board's regulations which allow a Petition to Revoke an Exemption to be filed at any time. *See* 49 C.F.R. § 1121.4(f). This regulation does not prohibit the same party from filing a second Petition to Revoke in the same proceeding. Since this second filing is not prohibited, it therefore follows that a request for discovery can be made in the second or third filing in accordance with Section 1121.2. This result would support the policy behind the Board's allowance of petitions to revoke at any time because new information hidden by a party requesting an exemption could surface at a later date, since if anything inappropriate was transpiring, this party would certainly not be drawing anyone's attention to the matter.

While UTU is certainly not accusing the CUOH of doing anything improper here, UTU has a difficult time understanding why the carrier is being so secretive and uncooperative in this proceeding where UTU's request is only for items mentioned in the Petition for the Exemption.

Based on the foregoing discussion, this motion to compel should be granted.

¹ While UTU's Amended Petition to Revoke in Finance Docket No. 34536 and the Notice of Verified Exemption herein were filed more or less simultaneously, UTU had sent its amended filing by overnight mail to the Board on September 23, so it obviously had not seen the CUOH filing at the time it was sent.

Respectfully submitted,



Daniel R. Elliott, III
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing United Transportation Union's Petition to Revoke has been served this 15th day of November, 2004, via first-class, postage pre-paid mail upon the following:

Andrew B. Kolesar, III
Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036


Daniel R. Elliott, III

PAUL C. THOMPSON
International President

RICK L. MARCEAU
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Associate General Counsel

• DANIEL R. ELLIOTT, III
Associate General Counsel

October 21, 2004

Andrew B. Koesar, III
Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036

Re: Finance Docket No. 34540

Dear Mr. Kolesar:

This is to request production of various materials set forth in the Notice of Exemption in this proceeding, filed September 24, 2004, as follows:

1. All leases and other written arrangements between the Columbus & Ohio River Rail Road Company (CUOH), CSXT and/or the Ohio Department of Transportation including leases and other arrangements that bear upon the CUOH leases and operations at issue in the above-referenced Finance Docket. *See:* Notice of Exemption, at pp. 3-4.
2. Any written arrangements between CSXT, the State of Ohio, Ohio Southern Railroad, Inc, Ohio Central Railroad, and/or CUOH regarding ownership or other interests in the subject line prior to the effective date of the transaction at issue. *See* Notice of Exemption at pp. 3-4.
3. Any operating agreement between CUOH, CSXT and/or State of Ohio regarding the C&N subdivision.

This request is made pursuant to 49 C.F.R. § 1121 in accordance with the petition to revoke, along with 49 C.F.R. § 1114.

Sincerely,

A handwritten signature in black ink, appearing to read "D. R. Elliott, III".

Daniel R. Elliott, III
Associate General Counsel

PAUL C. THOMPSON
International President

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Associate General Counsel

UPS Next Day Air

October 28, 2004

Andrew B. Kolesar, III
Slover & Luftus
1223 17th Street, N.W.
Washington, DC 20036

Re: Finance Docket No. 34540

Dear Mr. Kolesar:

This is in reference to the Reply of Columbus & Ohio River Railroad Company in the above-referenced proceeding regarding discovery. I included my discovery request in the service copy of the Petition to Revoke. I have attached another copy of this request to this letter. Also, I did indicate in the Petition to Revoke that I served a discovery request on you in the last line. Please provide me with the documents in a timely manner pursuant to this request.

Sincerely,

Daniel R. Elliott, III
Associate General Counsel

Enclosure

cc: C. J. Miller, III, General Counsel